

## TITLE 2. FAIR POLITICAL PRACTICES COMMISSION

NOTICE IS HEREBY GIVEN that the Fair Political Practices Commission (the “Commission”), under the authority vested in it under the Political Reform Act (the “Act”)<sup>1</sup> by Section 83112 of the Government Code, proposes to adopt, amend, or repeal regulations in Title 2, Division 6 of the California Code of Regulations. The Commission will consider the proposed regulation at a public hearing on or after **September 22, 2011**, at the offices of the Fair Political Practices Commission, 428 J Street, Suite 800, Sacramento, California, commencing at approximately **10:00 a.m.** Written comments must be received at the Commission offices no later than **5:00 p.m.** on **September 20, 2011**.

### BACKGROUND/OVERVIEW:

The Act creates two basic categories of payments made to a candidate: contributions and gifts. Generally, a “contribution” includes “a payment, forgiveness of a loan, payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received, unless *it is clear from the surrounding circumstances that it is not made for political purposes.*” (Section 82015(a).) A “gift” is “any payment that confers a *personal benefit* on the recipient, to the extent that consideration of equal or greater value is not received . . .” (Section 82028(a).) These categories assist in determining how a particular payment should be reported and also determines what, if any, limits apply.

Additional descriptors and exceptions apply to those payments that are classified as contributions. For example, a payment “made at the behest of” a committee is a contribution to the committee unless full and adequate consideration is received. (Section 82005(b)(1).) Similarly, payments made at the behest of a candidate are also contributions, unless certain factors apply. A payment is made at the behest of a candidate whenever it is made “under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of” a candidate. (Section 82015; Regulation 18225.7.)

In pertinent part, Section 82015(b)(2)(B)(iii) establishes a third type of payment subject to a unique reporting scheme. Section 82015(b)(2)(B)(iii) provides that even if a payment is made “at the behest” of an elected officer or a member of the Public Utilities Commission (“PUC”),<sup>2</sup> it is not considered a contribution to that officer if it is made principally for legislative, governmental, or charitable purposes, in which case it is neither a gift nor a contribution. Referred to as “behested payments,” the payment must still be reported. The officer must file a report detailing the payment if the payment is principally for a legislative, governmental or charitable purpose and the aggregate amount is \$5,000 or more.

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

<sup>2</sup> As of January 1, 2009, the California Public Utilities Commission is included for purposes of Section 82015(b)(2)(B).

This report, known as a “behested payment report,” must be filed within 30 days with the officer's agency when the amount of the payment, or aggregate payments for similar purposes made at the behest of the officer by the same source, is \$5,000 or more in a calendar year. The purpose of the “behested payment” provision in Section 82015 is to capture reporting for payments that are not direct contributions to elected officials, but that the public would want to see in periodic reports. That is, the purpose is to provide disclosure of payments when there might be a potential for influence over a public official.

As noted above, under the statute, a donation to a charitable organization is made at the behest of an elected official only if the payment is solicited, requested, or suggested by the elected official or otherwise made to the organization in cooperation, consultation, coordination with, or with the consent of the elected official. Behested payments reporting also applies when donations to charitable organizations are solicited by an elected official or by staff or an agent acting for that elected official, such as their chief of staff, director or other staff.

This broad definition of “at the behest,” however, has led to some odd results. For example, in the *Filchev* Advice Letter, No. I-09-073, we were asked whether if a member of the PUC was on the board of directors, an advisory council, or a fundraising committee of a charitable organization, a donation to the organization is a reportable behested payment. We advised that a donation to a charitable organization is not a reportable behested payment merely because an elected official serves on the board of directors, an advisory council, or a fundraising committee of the organization and the official’s name is listed on a solicitation. In addition, a donation to a charitable organization in response to a letter soliciting a donation is not necessarily a reportable behested payment if the name of an elected official holding a position with the organization is identified in the letterhead or the text of the letter. *Id.* *Filchev* stated, however, that if the solicitation letter is signed by the elected official or a reasonable person could conclude the letter is from or on behalf of the elected official, a donation will be a reportable behested payment. *Id.*

In light of the *Filchev* Advice Letter and other letters (*e.g.*, *Peth* Advice Letter, A-11-063, advising that listing the Governor’s name as co-chairman on a letter from the Governor’s Council on Physical Fitness and Sports does not create a behested payment when neither the Governor, nor his staff would be soliciting contributions), staff has identified a need to clarify, by regulation, under what scenarios a behested payment occurs.

Staff held an interested persons meeting on July 14, 2011 to hear public input on possible regulation language. The meeting yielded many useful comments that informed a revision to the proposed regulation language

#### REGULATORY ACTION:

##### Adopt 2 Cal. Code Regs. Section 18215.3:

Given the comments above, the Commission will consider creating standards for determining whether a communication rises to the level of a behested payment for purposes of Section 82015(b)(2)(B)(iii). Staff incorporated these suggestions into the language found in the draft regulation.

SCOPE:

The Commission may adopt the language noticed herein, or it may choose new language to implement its decisions concerning the issues identified above or related issues.

FISCAL IMPACT STATEMENT:

Fiscal Impact on Local Government. This regulation will have no fiscal impact on any local entity or program.

Fiscal Impact on State Government. This regulation will have no fiscal impact on any state entity or program.

Fiscal Impact on Federal Funding of State Programs. This regulation will have no fiscal impact on the federal funding of any state program or entity.

AUTHORITY: Government Code Section 83112 provides that the Fair Political Practices Commission may adopt, amend, and rescind rules and regulations to carry out the purposes and provisions of the Political Reform Act.

REFERENCE: The purpose of this regulation is to implement, interpret, and make specific Government Code Section 82015.

CONTACT: Any inquiries should be made to Heather M. Rowan, Fair Political Practices Commission, 428 J Street, Suite 800, Sacramento, CA 95814; telephone (916) 322-5660 or 1-866-ASK-FPPC. Proposed regulatory language can be accessed at <http://www.fppc.ca.gov/index.php?id=247#2>.